

direct conflict with the Eighth Circuit, the Fourth Circuit in *Constantine* concluded that “[w]hile *Lane* specifically overrules *Wessel* only with respect to the application of Title II to cases involving the right of access to courts, the reasoning of *Lane* renders *Wessel* obsolete.” *Constantine*, 411 F.3d at 486 n. 8. Similarly, in *Association for Disabled Americans*, 405 F.3d at 958, the Eleventh Circuit held that Title II, “as applied to access to public education, constitutes a valid exercise of Congress’s enforcement power under Section 5 of the Fourteenth Amendment.” In so ruling, the Eleventh Circuit noted that *Lane* had “conclusively held that Congress had documented a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify enactment of a prophylactic remedy,” and it emphasized that the Supreme Court pointed to “‘a pattern of unequal treatment’” that went well beyond the access-to-courts context. *Id.* (quoting *Lane*, 541 U.S. at 525).

The rulings of the Fourth and Eleventh Circuits treat pre-*Lane* across-the-board rulings like *Alsbrook* as “obsolete,” *Constantine*, 411 F.3d at 486 n. 8, and demand an “as-applied” approach that looks to “the particular constitutional rights at stake in the relevant category of public services,” *Association for Disabled Americans*, 405 F.3d at 958. Those cases directly conflict with the Eighth Circuit’s holding here that *Alsbrook*’s across-the-board invalidation of Title II continues to apply to all applications of the statute outside of the “discrete” access-to-courts context. Pet. App. 6a. That conflict would ordinarily warrant this Court’s plenary review – especially because the court of appeals held a federal statute unconstitutional. However, because this Court’s decision in *Georgia* and *Goodman* will

likely clarify the scope of *Lane*'s holding and the methodology of Section 5 analysis in the context of Title II of the ADA, this petition should be held pending this Court's decision in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States v. Georgia*, No. 04-1203, and *Goodman v. Georgia*, No. 04-1236, and then disposed of in accordance with the Court's decision in those consolidated cases.

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**In The
Supreme Court of the United States**

UNITED STATES OF AMERICA,

Petitioner,

v.

**NEBRASKA DEPARTMENT OF HEALTH AND
HUMAN SERVICES FINANCE AND SUPPORT, ET AL.,**

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

**BRIEF FOR RESPONDENTS NEBRASKA
DEPARTMENT OF HEALTH AND
HUMAN SERVICES FINANCE AND SUPPORT,
ET AL. IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress' power under Section V of the Fourteenth Amendment, as applied to potential institutionalization.

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RULE

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OTHER AUTHORITY

Americans with Disabilities Act of 1990, 42 U.S.C. 12131	<i>passim</i>
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ARGUMENT

A. The Eighth Circuit's Decision Is Not In Conflict With Relevant Decisions Of This Court

This Court's Rule 10 establishes criteria to be considered by this Court in weighing a Petition for a Writ of Certiorari. The only potentially applicable provision of Rule 10 is section (c).

No conflict with this Court's prior rulings

The Eighth Circuit's opinion is consistent with this Court's holdings in *Tennessee v. Lane*, 541 U.S. 509 (2004) and the companion cases of *United States v. Georgia* and *Goodman v. Georgia*, 126 S. Ct. 877 (2004). In *Lane*, this Court held that Title II, when applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment. Recently, this Court declared in *Georgia* and *Goodman* that Title II validly abrogates state sovereign immunity "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment." Consequently, the Eighth Circuit opinion was in line with this Court's precedent in holding that Title II, as applied to plaintiffs claiming additional funding of community-based services, is not a valid exercise of Congress' § 5 enforcement power under the Fourteenth Amendment.

No fundamental right violated

The Petitioner's claim for additional funding of community-based services does not implicate a fundamental constitutional right under the Fourteenth Amendment. In

Lane, the plaintiffs were paraplegics who used wheelchairs and claimed that they were denied both the access to, and the services of, the state court system because of their disabilities. One of the plaintiffs, George Lane, alleged that he was compelled to make an appearance and answer criminal charges on the second floor of a county courthouse that had no elevator, crawled up two flights of stairs on his first appearance to get to the courtroom, and was arrested and jailed for failure to appear after refusing to crawl or be carried by officers to the courtroom on subsequent occasions.

The other plaintiff, Beverly Jones, a certified court reporter, alleged that she was not able to gain access to numerous court houses, and consequently lost work and opportunities to participate in the judicial process. Recognizing that Title II seeks not only to enforce a "prohibition on irrational disability discrimination," but also "other basic constitutional guarantees," this Court held that "Title II, as it applies to the class of cases *implicating the fundamental right of access to the courts*, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." *Lane*, 541 U.S. at 522, 534 (emphasis added).

Nor is this a classic deinstitutionalization case with plaintiffs residing in institutions as in *Olmstead v. L.C.*, 527 U.S. 581 (1999). In the present matter, Petitioners are seven developmentally disabled adults, alleging receipt of an inadequate level of home and community-based Medicaid-funded services that placed them at "imminent risk of unnecessary institutionalization." *Bill M. v. Nebraska Department of Health and Human Services Finance and Support*, 408 F.3d 1096, 1098 (8th Cir. 2006). Indeed, this Court has acknowledged that unjustified commitment

violates due process and equal protection rights secured under the Fourteenth Amendment. See *Jackson v. Indiana*, 406 U.S. 715 (1972). However, in this case, Petitioners merely allege an "imminent risk of unnecessary institutionalization." None of the Petitioners presently reside in an institution. As compared to the plaintiffs in *Lane*, the Petitioners are not seeking enforcement of a fundamental right of which they have been deprived, such as access to the court system. Here, Petitioners are seeking additional funding of community-based services, which "implicates no fundamental constitutional right." *Bill M.*, 408 F.3d at 1101 (Colloton, J., *concurring*).

Furthermore, the Respondents' conduct in this case has not violated the Fourteenth Amendment. In *Lane*'s companion cases of *Georgia* and *Goodman*, the plaintiff alleged that he was confined to a 12-foot-by-3-foot cell for approximately 24 hours per day, which prevented him from turning his wheel chair around in the cell. Additionally, the plaintiff alleged that he injured himself in attempting to move from his wheelchair to the shower or toilet by himself, that he was forced to sit in his own feces and urine on several occasions without assistance from prison officials, and that he was denied medical treatment, physical therapy, and access to essentially all prison programs and services due to his disability. This Court granted certiorari to determine whether Title II validly abrogated state sovereign immunity with respect to the plaintiff's claims. In its reasoning, this Court acknowledged that "§ 5 grants Congress the power to enforce the provisions of the [Fourteenth] Amendment by creating private remedies against the States for actual violations of those provisions." *Georgia*, 126 S. Ct. at 881. Accordingly, this Court held that "insofar as Title II creates a private

cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." *Id.* at 882. Consequently, this Court remanded the suit to enable the lower courts to determine, *inter alia*, "to what extent such misconduct also violated the Fourteenth Amendment." *Id.*

However, the Respondents' alleged conduct did not violate the provisions of the Fourteenth Amendment. Unlike the plaintiff in *Georgia* who alleged numerous potential violations of the Fourteenth Amendment, Petitioners merely allege that they have been placed at "imminent risk of unnecessary institutionalization." *Bill M.*, 408 F.3d at 1098. The Eighth Circuit opinion acknowledged this point in holding that "[t]he mere risk that Plaintiffs may be institutionalized due to lack of adequate funding does not constitute an actual or imminent harm sufficient to satisfy the first element of standing." *Id.* at 1099. Therefore, in holding that Title II did not validly abrogate state sovereign immunity, the Eighth Circuit opinion was consistent with this Court's ruling in *Georgia*.

Even if the Eighth Circuit opinion engaged in a "context specific analysis" and considered due process as a constitutional basis for Title II, the circuit court's ultimate holding would not have been altered. As mentioned above, Title II, as applied to plaintiffs claiming additional funding of community-based services does not implicate a fundamental right. Petitioners failed to allege an actual or imminent deprivation of a fundamental right under the Due Process Clause. Therefore, the Eighth Circuit's opinion is not in conflict with the relevant decisions of this Court.

CONCLUSION

The Respondents hereby respectfully request that this Court deny the Petitioner's Petition For A Writ Of Certiorari for the foregoing reasons which clearly demonstrate that said Petition does not pass Rule 10 muster.

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